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SUPREME COURT, U. S.

No. 73-476

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SEYMOUR GROSS, PETITIONER

v.

MEDICAL MUTUAL OF CLEVELAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue is whether a previous judgment dismissing petitioner's complaint for lack of jurisdiction bars this suit.

In 1971, petitioner filed a complaint in an Ohio state court against a government agent administering the Medicare insurance program, Medical Mutual of Cleveland, Inc., seeking damages or interest for unlawful and unreasonable delay in processing and paying claims of Medicare subscribers. The defendant removed the action under 28 U.S.C. 1442(a)(1) to federal district court, and that court dismissed the action for lack of jurisdiction (Pet. 6; Pet. App. 19-23). The petitioner filed a notice of appeal and then voluntarily withdrew it.

Subsequently, in 1972, the petitioner filed a complaint in federal district court against the same defendant alleging the same misconduct and seeking the same relief (Pet. 5-6; Pet. App. 15-18). The district court, treating the defendant's motion to dismiss as a motion for summary judgment, granted the motion on the ground that the prior judgment was *res judicata* (Pet. 6-7; Pet. App. 17-18). The court of appeals affirmed (Pet. App. 14).

The court below correctly dismissed this action as barred by *res judicata*. Further review by this Court is not warranted.

1. Petitioner argues that the dismissal for lack of jurisdiction in the first action is not *res judicata* in the second suit since under Rule 41(b) of the Federal Rules of Civil Procedure a dismissal for lack of jurisdiction is not an adjudication on the merits (Pet. 7). Petitioner's argument is based upon the theory that *res judicata* applies only to adjudications on the merits of an action. It is well settled, however, that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166. Accord, *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376-377; *Stoll* v. *Gottlieb*, 305 U.S. 165, 172-173; *Barzin* v. *Selective Service Local Board No. 14*, 446 F. 2d 1382, 1383 (C.A. 3); *Hadge* v. *Second Federal Savings and Loan Ass'n of Boston*, 409 F. 2d 1254, 1257 (C.A. 1); *Acree* v. *Air Line Pilots Ass'n*, 390 F. 2d 199, 203 (C.A. 5), certiorari denied, 393 U.S. 852; *Hicks* v. *Holland*, 235 F. 2d 183 (C.A. 6), certiorari denied, 352 U.S. 855; *Estevez* v. *Nabers*, 219 F. 2d 321, 323-324 (C.A. 5). See *Durfee* v. *Duke*, 375 U.S. 106. These cases establish that a

final determination of an action is conclusive in a subsequent suit as to the issues previously adjudicated, even though these issues are jurisdictional, rather than ones involving the merits of the case. In the instant case, the jurisdictional question had already been litigated and decided adversely to the petitioner in the prior suit so it could not be relitigated in the second action.[1]

2. Since petitioner's present action is barred by *res judicata,* the instant petition does not properly present the second issue which petitioner seeks to raise, *viz.,* whether the district court in the first suit erroneously ruled on the jurisdictional issues (Pet. 11).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Neither of the cases cited by petitioner (Pet. 7-11) is apposite here. *Bell* v. *Hood,* 327 U.S. 678, did not deal with *res judicata* at all. *Costello* v. *United States,* 365 U.S. 265, held that the dismissal of a denaturalization proceeding for failure to file an affidavit of good cause—a prerequisite under the applicable statute—was a dismissal for lack of jurisdiction, and thus not an adjudication on the merits which would, under Rule 41(b), bar a subsequent denaturalization proceeding on the same facts. *Costello* thus involved the question of whether, once the original jurisdictional defect was cured, a subsequent suit was barred by the earlier dismissal. In contrast, petitioner here seeks simply to relitigate the earlier decision on the jurisdictional issue.

[0611-1973-10]